In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 842

H. NEIL KELLY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 297 F. 2d 437.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1961. A petition for rehearing *en banc* was denied on February 2, 1962. Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including April

4, 1962. The petition for a writ of certiorari was filed on April 4, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District of Columbia statute forbidding the uttering of a worthless check repealed, by implication, the District of Columbia statute on false pretenses as applied to such transactions.

STATUTES INVOLVED

Section 1301 of Title 22, District of Columbia Code, provides in pertinent part:

> Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value, or procures the execution and delivery of any instrument of writing or conveyance of real or personal property, or the signature of any person, as maker, indorser, or guarantor, to or upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness, and whoever fraudulently sells, barters, or disposes of any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness, for value, knowing the same to be worthless, or knowing the signature of the maker, indorser, or guarantor thereof to have been obtained by any false pretense, shall, if the value of the property or the sum or value of the money or property so obtained, procured, sold, bartered, or disposed of is $100 or upward, be imprisoned not less than one year nor more than three years * * *.

Section 1410 of Title 22, D.C. Code, provides:

> Any person within the District of Columbia who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or be fined not more than $1,000, or both. As against the maker or drawer thereof the making, drawing, uttering, or delivering by such maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in its possession or control, shall be prima facie evidence of the intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within five days after receiving notice in person, or writing, that such draft or order has not been paid. The word "credit", as used herein, shall be construed to mean arrangement or understanding, express or implied, with the bank or other depository for the payment of such check, draft, or order.

STATEMENT

The petitioner was convicted by a jury in the United States District Court for the District of Co-

lumbia on four counts charging violations of the District of Columbia false pretenses statute (R. 1-3, 102),[1] and was given concurrent sentences of one to three years on each count (R. 128). The court of appeals affirmed *per curiam*, stating that it had reviewed the questions raised with respect to Count II, which alone was sufficient to support the judgment (citing *Hirabayashi v. United States*, 320 U.S. 81), that the evidence supported petitioner's conviction on that count and that no reversible error had been committed at trial (Pet. App. 2a).

The facts with respect to Count II may be briefly summarized as follows. Using the name Harold A. Barkley, the petitioner deposited with a broker 500 shares of Commodity Holding Corporation stock for sale at $6.50 per share (R. 44, 46, 28). The stock could be purchased at 10¢ per share and had little value (R. 18-19). Petitioner's accomplice, James A. Gregory, asked a broker in the Stanford Corporation to purchase 500 shares of this stock at up to $8 per share (R. 12, 26). The Stanford Corporation purchased the stock (R. 10-11) and received a check from Gregory for $3502.39 (Ex. 9, R. 109-110; 13). About five or six days after receipt of the check, Stanford delivered the stock to Gregory (R. 13).

Meanwhile, Gregory had stopped payment on the check (R. 13, Ex. 16J, 119). The account on which it had been drawn was sufficient to cover it only by virtue of a check in the amount of $3765 that petitioner

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[1] References are to the Joint Appendix prepared for the Court of Appeals.

had written to Gregory and that the latter had deposited (R. 31-36). Petitioner's check was worthless and was dishonored by the bank on which it was drawn (R. 36). Petitioner thereafter cashed the checks made out to Harold Barkley in payment for the stock (R. 38-40). Thus, he and his accomplice ended up with both the stock and the proceeds of its sale.

In submitting the case to the jury, the trial court, after defining the elements of the offense of obtaining property by false pretenses (R. 96-97), stated with respect to Count II (R. 97-98):

> Count 2, which is the first count you will consider, charges that on or about June 1st, 1959, the defendant, H. Neil Kelly, Jr., made false representations to Stanford, and by means of the false representations he obtained stock certificates from Stanford of the Commodity Holding Corporation. Specifically, it is charged that, in order to obtain this stock certificate, a check of $3500 was given to Stanford, without any intention at the time that the check would be made good, and, on the contrary, with the intention that payment should be stopped on the check, and payment was immediately stopped on it, but in the meantime Stanford had delivered the stock certificate of the Commodity Holding Corporation to Kelly or his associate. Now, that is the simple charge involved here, namely, giving a $3500 check without intention that it should be paid and immediately stopping payment on it and in the meantime obtaining the stock certificate.

ARGUMENT

Petitioner argues that the false pretenses charged and submitted to the jury could have been charged under the District of Columbia worthless check statute, enacted in 1922 (22 D.C. Code 1410, *supra*, p. 3). He asks this Court to hold that the 1922 statute repealed by implication the older false pretenses statute (22 D.C. Code 1301, *supra*, p. 2) as applied to bad checks. This argument, which was made to the court below, was implicitly rejected by that court when it affirmed the conviction on Count II. It was within the special province of the Court of Appeals for the District of Columbia Circuit to determine this question of local criminal law with respect to local statutes applicable in the District of Columbia alone, and there is no reason for this Court to review its determination. This Court will not ordinarily intervene in the administration of criminal law in matters of peculiarly local concern, not involving general federal law or constitutional limitations. *Fisher* v. *United States*, 328 U.S. 463, 476. See also *Griffin* v. *United States*, 336 U.S. 704, 715.

Petitioner's suggestion that the States have reached differing conclusions on the effect of specific bad check statutes on more general false pretense statutes emphasizes the fact that the problem is a local one, as to which the Court of Appeals for the District of Columbia Circuit is free to adopt its own rule. The ruling that the bad check statute did not repeal by implication the general false pretenses statute is fully justi-

fied. Repeals by implication are not favored. *See United States v. Gilliland*, 312 U.S. 86, 95-96; *United States v. Beacon Brass Co.*, 344 U.S. 43. The legislative history cited by petitioner (Pet. 6-7) shows that the bad check statute was intended merely to afford the government a means of punishing the giving of worthless checks even if it were unable to prove all the elements of false pretenses. Since here there was more than the giving of a bad check, all the elements of obtaining property by false pretenses being present, the prosecution was properly brought under the false pretenses statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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